To be Argued by:
MARK R. SEIDEN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

SOUTH ROAD ASSOCIATES, L.L.C.,

Docket No.: 2002-09203

Plaintiff-Respondent,

– against –

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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1. The index number of the case in the court below is 2000/174.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, Dutchess County.

4. The original Summons and Complaint were filed on January 11, 2000, and the Amended Complaint was filed on May 5, 2000. The Answer was served on January 8, 2001.

5. The nature and object of the action is for contract liability.

6. This appeal is from an Order of the Hon. Mark C. Dillon entered on or about September 23, 2002.

7. This appeal is on the full reproduced record.

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QUESTIONS PRESENTED

1. Does a lease providing that a tenant should return *only* its leased interior building space in good order and condition obligate the tenant to return *all* common areas, exterior space, soil, groundwater and bedrock in good order and condition?

2. Where parties enter into a later, specific agreement to govern the clean-up of particular property damage, does that agreement modify or inform the meaning of a generic good order and condition clause in an earlier lease?

3. Is a party judicially estopped from asserting an argument that is consistent with its prior statements and arguments, was not necessary to any court's earlier ruling, and was not even implicated in any prior adversarial proceeding?

4. Did the lower court err by entering summary judgment in favor of the plaintiff on its contract claim where the court failed to determine the meaning of all the relevant terms in the contract and had insufficient evidence in the record demonstrating the agreement's breach?

For over twenty years, Defendant-Appellant, International Business Machines Corporation ("IBM"), has abated and monitored contamination on property near where it once leased building space. IBM's clean-up efforts have been so extensive that this property, which was once categorized as a significant public threat, is now a "closed" site with respect to health and environmental problems. Despite IBM's costly and comprehensive abatement program, the property's owner, a real estate investment group called South Road Associates ("SRA"), has commenced suit against IBM seeking money to raze the old buildings in which IBM leased space, remove all trace chemicals from under them, and build new ones. SRA reasons that the presence of trace chemicals under these buildings constitutes a breach of the "good order and condition" clause of the parties' lease agreement (the "Lease"), and IBM is liable, among other things, for their removal and any diminished property value caused by them.

The relief SRA seeks is not only unnecessary—as a matter of state and federal law the past contamination has been remedied—but unwarranted under the contract theory SRA asserts. To be sure, SRA may have once had some claim under property or tort law for the impact, if any, of trace chemicals on its property value. But SRA lost its right to assert these claims through inaction and delay. After learning of the contamination, SRA did not sue IBM but renewed IBM's Lease, waiting until well after the limitations period had expired (and IBM decided not to renew its Lease again) before asserting claims against IBM. Having no valid property or tort claim remaining, SRA now contorts contract law to fit a round peg in a square hole, to the detriment of sound legal policy.

The Lease's good order and condition clause requires IBM to return *only the premises that it actually leased* in good order and condition. That is, IBM was required to return only its leased interior space, not all surrounding real property and the subsurface, in good order. No one

has disputed, moreover, that IBM returned this interior space in such order. In any event, whatever duty IBM might have owed to SRA under the Lease was altered by 1984 and 1994 agreements, which require IBM to abate the contamination only to the extent required by state and federal environmental law, as it has done.

In light of the clear meaning of the good order and condition clause, the lower court's decision to grant summary judgment in SRA's favor was erroneous. Indeed, the lower court ignored the fundamental principle that the plain language of the Lease controls its meaning and IBM's obligations under it. The court concluded instead that the good order and condition clause could not mean what it says because the Lease mentions property beyond IBM's leasehold interest in the premises. But these contractual provisions are merely extraneous bargained-for use rights and service duties that do not inform the meaning of the clause at issue here. The court also incorrectly sought to justify its departure from the plain language of the Lease by adopting an interpretation of the judicial estoppel doctrine that is breathtakingly expansive, based on a fundamental misreading of IBM's submissions to courts and agencies, and wrong.

In all events, the lower court should not have entered summary judgment in SRA's favor because the record is insufficient for such a holding. There is insufficient evidence to demonstrate that the property was not in "good order and condition" when it was returned to SRA in 1994. Certainly, the lower court cited none, and it provided no explanation for its summary conclusion that this clause was in fact breached. In its rush to judgment, the lower court also ignored the provision in the good order and condition clause stating that IBM is *not* liable for any damages covered under SRA's insurance policy. The lower court could not have made any findings on this issue because SRA has to date failed to produce the insurance policy

covering its property at the time of the contamination. Accordingly, the entry of summary judgment in SRA's favor was erroneous.

STATEMENT OF FACTS

The Lease

From the mid-1950s to 1994, IBM leased the interior building space at issue here and used the space for manufacturing, parts-cleaning, storage, shipping and other commercial operations. (R. at 174, 177) SRA acquired this space, and the surrounding property, in 1974. This dispute concerns the lease that SRA and IBM entered on March 1, 1981, which governed their relationship until February 28, 1994, when IBM vacated the leased premises.

Pursuant to the Lease, IBM agreed to pay rent for a specific leasehold interest, which is defined as the "premises," a "water tower" and "appurtenances" in the second paragraph of the Lease:

> the space being more particularly shown on the attached floor plan designated Exhibit "A" (hereinafter called the "premises") consisting in the aggregate of 113,400 gross square feet, in two buildings consisting of 113,400 gross square feet (hereinafter called the "buildings") situated on real property (hereinafter called the "land") located at 622 South Road (Route 9), and a Water Tower and appurtenances in the Town of Poughkeepsie State of New York.

(R. at 51) As is plain from its terms, this paragraph not only identifies IBM's leasehold interest but also defines key words, such as "premises," "buildings" and "land," that are used throughout the Lease. "Premises," for example, is defined to mean "the space" shown on a floor plan; "buildings" are the two structures containing that space; and "land" means the real property under the buildings.

Several other provisions of the Lease establish IBM's limited rights to use for free other parts of SRA's property, such as common areas and a parking facility. Article 14 of the Lease

provides that SRA would, "without charge to [IBM], provide and maintain for the exclusive use of [IBM's] employees and invitees, a parking facility sufficient to accommodate 82 cars in a paved parking area located in or adjacent to the building as shown on Exhibit A." (R. at 58) Article 5 states that SRA would provide "facilities for the Tenant's loading, unloading, delivery and pick-up activity." (R. at 55) In addition, the Lease repeatedly refers to IBM's use of walkways, driveways, curbs, and common areas. (*See, e.g.,* R. at 54-55, 56-58 (Article 5(a), Article 9, Article 11))

This dispute centers around the meaning of the good order and condition clause, Article 7 of the Lease. It provides, in pertinent part:

> At the expiration of the term, the Tenant will remove its goods and effects (except as elsewhere provided in this Lease) and will (a) peaceably yield up to the Landlord the premises in good order and condition, excepting ordinary wear and tear, repairs required to be made by the Landlord, or damage, destruction, or loss by fire or other casualty or by any other cause unless such damage, destruction or loss is caused by the willful act or negligence of the Tenant and is not covered by insurance carried or required by this Lease to be carried by the Landlord.

(R. at 55) SRA argued below that IBM breached this provision by contaminating some of the property's soil, bedrock and groundwater. No one has disputed, however, that IBM returned its leased interior building space in "good order and condition." Any such claim now, moreover, would be barred by the statute of limitations.

The Groundwater, Bedrock and Soil Contamination

As part of its commercial operations at the premises, IBM stored chemical wastes in an underground storage tank situated between the buildings in which it leased space. (R. at 290) Unbeknownst to IBM, the storage tank leaked and released waste into surrounding soil, bedrock and groundwater. (*Id.*) In 1981, IBM discovered the contamination caused by the tank after screening at a monitoring well showed contamination at the site. (*Id.*) It immediately conducted

a comprehensive investigation of the contamination, installing 27 additional monitoring wells between 1982 and 1984 and sampling soil from the site. (R. at 291) These tests showed that the soil, bedrock and groundwater around the tank were contaminated. (R. at 292-94) In 1987, the New York State Department of Environmental Conservation ("NYSDEC") declared the site a Class 2 environmental hazard, or a "significant threat to the public health and environment." *See* N.Y. Envtl. Conserv. Law § 27-1301 *et seq.* (R. at 347)

During the 1980s, even before NYSDEC intervened, IBM began a comprehensive remediation program to reduce contamination on the property. As part of this program, IBM investigated the extent and nature of the contamination in the soil, bedrock and groundwater. (R. at 295) With SRA's consent, IBM removed approximately 5,300 cubic yards of contaminated soil from the site, as well as the underground tank that caused the contamination. (R. at 297, 332) In 1993, IBM installed a pump-and-treat system to address residual contamination in the ground water. (R. at 345) Finally, IBM conducted (and continues to conduct) extensive post-remediation monitoring, which shows that the quality of groundwater at the site has greatly improved. (R. at 299-300) Today, the remaining groundwater contamination is confined to a small area that is continuously treated by the pump-and-treat system IBM installed. (R. at 85)

As a result of IBM's clean up efforts, in March 1993, NYSDEC modified the status of the site from Class 2 to Class 4, which means "site properly closed—requires continued management." (R. at 341, 343) NYSDEC identified the "continued management" as operation of the pump-and-treat system. (R. at 343, 345, 347) To this day, IBM monitors the groundwater at the site.

Like NYSDEC, the United States Environmental Protection Agency ("EPA"), through its contractor, Ebasco, has concluded that no further remedial action is required at the site. (R. at 82-84) "The contamination in the groundwater beneath the site has been monitored since 1982, and there is no evidence to suggest that the contamination has migrated or is migrating off-site." (R. at 83) EPA also issued a "Remedial Site Assessment Decision" of "No Further Action" on August 24, 1995. (R. at 84)

The 1984 & 1994 Agreements

After IBM determined the extent of contamination at the site, it approached SRA to discuss possible remediation plans. As a result of these discussions, in 1984, IBM and SRA entered into a letter agreement (the "1984 Agreement") setting forth IBM's responsibilities with respect to the contamination. (R. at 68-69) As part of this Agreement, IBM acknowledged that soil, groundwater and bedrock around and beneath the buildings were contaminated with organic chemicals and assumed "sole responsibility" for the contamination. (R. at 68) IBM promised to "abate any pollution resulting from the presence of such chemicals to the satisfaction of all requisite governmental agencies." (R. at 69) In addition, IBM agreed to indemnify SRA, its heirs, successors and assigns against any claims arising out of the contamination or IBM's remediation activities. (R. at 68, ¶ 3; R. at 69, ¶ 5)

On the day IBM vacated the premises, February 28, 1994, IBM and SRA affirmed IBM's obligations under the 1984 Agreement by entering into a second agreement (the "1994 Agreement"). (R. at 70-72) Under it, SRA agreed to give IBM access to the site "for the purpose of operating and maintaining the existing monitoring wells and remediation equipment." (R. at 71) In addition, IBM confirmed that it would "defend, indemnify, and hold SRA harmless

from any third-party claims, actions or proceedings arising out of IBM's future operation and maintenance of the monitoring wells and remediation equipment." (*Id.*)

Procedural History

Although IBM has, as the 1984 Agreement provides, abated contamination at the site to the satisfaction of all relevant state and federal agencies, SRA commenced suit against IBM in December 1998 (the "RCRA Action"), seeking damages for breach of contract, unjust enrichment, and alleged violations of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA"). IBM removed the case to the United States District Court for the Southern District of New York and moved to dismiss the RCRA and unjust enrichment claims. (R. at 170-72) The district court granted IBM's motion to dismiss the federal claims and declined to exercise supplemental jurisdiction over the remaining state law claims. (R. at 427) The United States Court of Appeals for the Second Circuit affirmed this decision on June 20, 2000. *SRA v. IBM*, 216 F.3d 251, 257-58 (2d Cir. 2000).

In January 2000, SRA commenced the instant lawsuit in the Dutchess County Supreme Court. SRA again sought damages for breach of contract and unjust enrichment, but this time added claims for takings in violation of the United States and New York Constitutions, common law negligence, breach of statutory duty, and public nuisance. (R. at 27-39) On March 3, 2000, IBM moved to dismiss most of these claims, arguing that the applicable limitations period had expired and that SRA had failed to state claims. SRA voluntarily dismissed most of its new claims, and IBM withdrew its motion.

SRA filed an Amended Complaint on May 5, 2000, asserting only breach of contract, nuisance and unjust enrichment. (R. at 40-48) In June 2000, IBM moved pursuant to CPLR 3211(a)(1), (7) to dismiss the last two claims. (R. at 156-60) With respect to nuisance, IBM

argued that SRA's Amended Complaint failed to state a claim because it contained no facts demonstrating that the contamination was an injury to the public, instead of simply SRA, as is required under nuisance law. With respect to unjust enrichment, IBM's argument was twofold. It maintained, first, that SRA had not conferred any "benefit" on IBM within the meaning of unjust enrichment law. (R. at 158) Rather, SRA had argued only that IBM violated environmental laws. (*Id.*) IBM contended, second, that SRA could not argue that it had no legal remedy while simultaneously asserting a breach of contract claim that sought the same damages as the unjust enrichment claim. (R. at 160)

On September 29, 2000, the Dutchess County Supreme Court, Beisner, J., granted IBM's motion. (R. at 161-65) The court explained that the public nuisance claim failed since "SRA's second cause of action is bereft of any allegations of harm to the public at large." (R. at 164) The court dismissed the unjust enrichment claim because SRA had not alleged that it conferred a benefit on IBM. (R. at 164-65) In the alternative, the court observed that SRA's claim would have to be dismissed because it was seeking "quasi-contractual recovery" that overlapped with its claims on "[a] valid written contract." (R. at 165) "Since the parties have a Lease agreement, the existence or validity of which is not disputed, SRA's cause of action based on unjust enrichment cannot be maintained." (*Id.*)

Subsequently, the parties filed cross-motions for summary judgment on SRA's breach of contract claim. IBM sought summary judgment on the ground that the Lease unambiguously provided that IBM was required to return only the "premises"—that is, the space in two buildings—in good order and condition, not the land and subsurface. Because no one had disputed that the space was returned in good order and condition, the court could award judgment to IBM as a matter of law. In the alternative, IBM argued that the 1984 Letter

Agreement specifically defined IBM's obligations with respect to the contamination and that IBM had fully complied with its terms.

SRA opposed IBM's motion and cross-moved for summary judgment on the ground that IBM was estopped from disclaiming liability under the Lease. According to SRA, IBM acted as if it had leased the contaminated areas. SRA also claimed that the parties intended the land and subsurface to fall within the scope of the Lease and did not intend the 1984 Letter Agreement to modify IBM's duties under the Lease.

In an opinion dated September 17, 2002, the Dutchess County Supreme Court, Dillon, J., denied IBM's Motion for Summary Judgment and granted SRA's Cross-Motion. The court observed, first, that because IBM had limited rights to use a parking facility and common areas, the parties intended the Lease's good order and condition clause to extend beyond the leased "premises" and include common areas, land and subsurface soil, bedrock and groundwater. (R. at 13-15) Second, the court held "*arguendo*" that even if the lease were ambiguous, extrinsic evidence, such as IBM's use of parking facilities, its snow removal, and payment of SRA's taxes, would demonstrate that the parties "intended IBM's use and occupancy of the site to extend well beyond floor space." (R. at 16) Third, the court observed that because IBM used the storage facility that ultimately leaked, it could not advance any argument disclaiming responsibility for those facilities. Fourth, it held that IBM was judicially estopped from claiming that it did not lease the contaminated soil, bedrock and groundwater because it had appeared in administrative proceedings and represented in its motions that the Lease was valid and enforceable. (R. at 16-18) Finally, the court concluded that the 1984 Letter Agreement did not reflect an agreement by the parties about IBM's duties under the Lease. (R. at 18-19)

The court did not enter any findings concerning the condition of the premises in 1994, the year IBM vacated it, and offered no explanation for its conclusion that IBM had failed to satisfy the "good order and condition" clause.

On September 23, 2002, the decision of the court was entered by the clerk. On October 8, 2002, IBM filed its Notice of Appeal with this Court. It now seeks reversal of the lower court's order and entry of judgment in favor of IBM. In the alternative, the court's order should be reversed, and this case remanded for further proceedings.

ARGUMENT

When reviewing a summary judgment decision, this Court applies the same standard as the lower court, which is defined in CPLR 3212(b):

> The motion shall be granted if, upon all the papers and proof submitted, the . . . defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party . . . . [T]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

Summary judgment should be granted only when the facts are not in dispute, and the sole issue before the Court is the legal conclusion to be drawn from those facts. *Doran v. Mut. Benefit Life Ins. Co.*, 106 A.D.2d 540, 541, 483 N.Y.S.2d 66, 67 (2d Dep't 1984).

In a breach of lease dispute, such as this case, this Court has held that it first examines the lease's terms to determine their meaning, and if those terms are unambiguous, summary judgment as to the lease's meaning is appropriate. *Poughkeepsie Sav. Bank, FSB v. G.M.S.Y. Assoc.*, 238 A.D.2d 327, 327, 656 N.Y.S.2d 917, 918 (2d Dep't 1997). "The cardinal rule in interpreting a lease is that the parties' intention is to be ascertained from the language employed, which, absent ambiguity, is a matter of law to be determined by the court[.]" *Moncure v. NYSDEC*, 218 A.D.2d 262, 265, 639 N.Y.S.2d 859, 862 (3d Dep't 1996); *In re Cale Dev. Co. v. Conciliation & Appeals Bd.*, 94 A.D.2d 229, 234, 463 N.Y.S.2d 814, 817 (1st Dep't 1983) (the

interpretation of clear and unambiguous language in a lease is a matter of law to be determined solely by the court), *aff'd*, 61 N.Y.2d 976, 463 N.E.2d 619, 475 N.Y.S.2d 278 (1984).

Applying these standards, it is clear the lower court erred when it denied IBM's Motion for Summary Judgment. The terms of the Lease are unambiguous: they require IBM to return only "the premises"—that is, its leased interior space—in good order and condition, which it did.

I. THE LEASE REQUIRES ONLY THAT IBM RETURN ITS RENTED INTERIOR BUILDING SPACE IN "GOOD ORDER AND CONDITION."

A. The Lease Specifically Defines The Term "Premises," As It Is Used In The Good Order And Condition Clause, To Mean Interior Space.

As in all contract cases,[1] the starting point for any dispute is the agreement's terms. Where the terms of a lease unambiguously set forth the parties' intent, extrinsic evidence is irrelevant, and the agreement's plain language controls. *Fox Paper Ltd.*, 168 A.D.2d at 605, 563 N.Y.S.2d at 441; *In re Cale Dev. Co.*, 94 A.D.2d at 234, 463 N.Y.S.2d at 817. When discerning the meaning of terms, moreover, "the proper aim of the court, which may not rewrite the contract, is to arrive at a construction which will give meaning to all of the language employed by the parties." *Fox Paper Ltd.*, 168 A.D.2d at 605, 563 N.Y.S.2d at 441. The Court of Appeals explained this principle of interpretation in *Rodolitz v. Neptune Paper Prods., Inc.*, 22 N.Y.2d 383, 239 N.E.2d 628, 292 N.Y.S.2d 878 (1968):

> the rule is well settled that a court may not, under the guise of interpretation, make a new contract for the parties or change the words of a written contract so as to make it express the real intention of the parties if to do so would contradict the clearly expressed language of the contract. [citations omitted] As we noted in *Raleigh Assoc. v. Henry* (302 N.Y. 467, 473, 99 N.E.2d 289 (1951)), we "concern ourselves with what the parties intended,

[1] It is axiomatic that a court should apply ordinary principles of contract construction when interpreting a written lease agreement. *Fox Paper Ltd. v. Schwarzman*, 168 A.D.2d 604, 605, 563 N.Y.S.2d 439, 441 (2d Dep't 1990); *Tantleff v. Truscelli*, 110 A.D.2d 240, 244, 493 N.Y.S.2d 979, 982 (2d Dep't 1985), *aff'd*, 69 N.Y.2d 769, 505 N.E.2d 623, 513 N.Y.S.2d 113 (1987).

> but only to the extent that they evidenced what they intended by what they wrote."

Id. at 386, 239 N.E.2d at 630, 292 N.Y.S.2d at 881; *see also New York Overnight Partners, L.P. v. Gordon*, 217 A.D.2d 20, 27, 633 N.Y.S.2d 288, 292-93 (1st Dep't 1995) (finding as a matter of law that written lease expressed parties' intent that term "land" was not intended to encompass "improvements," refusing to admit extrinsic evidence to contradict unambiguous term of the lease), *aff'd*, 88 N.Y.2d 716, 673 N.E.2d 123, 649 N.Y.S.2d 928 (1996).

Applying these rules to this case, the meaning of the Lease is clear: IBM did not have to return SRA's soil, groundwater and bedrock in "good order and condition." The good order and condition clause expressly limits IBM's duty to "peaceably yield[ing] up to the Landlord *the premises* in good order and condition." (R. at 55) (emphasis supplied) "Premises," moreover, is a defined term in the Lease that means "the space being more particularly shown on the attached floor plan designated Exhibit 'A' (hereinafter called the 'premises') consisting in the aggregate of 113,400 gross square feet in two buildings consisting of 113,400 gross square feet (hereinafter called the 'buildings') situated on real property (hereinafter called the 'land') located at 622 South Road (Route 9)." (R. at 51) Thus, by its terms, the Lease defines the area that must be returned in good order and condition as only the interior space depicted in the floor plan,[2] and specifically distinguishes that space from the "buildings" in which it is found and the "land" on which the buildings sit.

Indeed, as it is defined in the Lease, the term "premises" cannot reasonably be read to include soil, groundwater and bedrock, for doing so would render several aspects of the definition nonsensical. For example, the Lease indicates that the "premises" is "space" shown in

[2]Despite IBM's repeated discovery requests, SRA has failed to produce a copy of the "floor plan" which is purported to be Exhibit "A" to the Lease. (R. at 51) IBM is unable to locate the "floor plan." Nevertheless, summary judgment is appropriate without it because the Lease describes what this Exhibit depicts.

a floor plan, but floor plans do not depict soil, groundwater and bedrock. The definition also states that the "premises" are located "*in* two buildings." Of course, soil, bedrock and groundwater are not "in" buildings but situated beneath them. Finally, the definition provides that the premises are "situated *on* real property," but soil, groundwater and bedrock are *below* real property or are part and parcel of it. Thus, "premises" can only mean space within buildings, or the definition of the term is clumsy, conflicting nonsense.

That the parties intended "premises" to have a narrow meaning is further confirmed by the ease with which the parties could have altered the terms of the Lease and defined premises more broadly. Had SRA and IBM intended the term "premises" to include land or subsurface, the parties could have easily rewritten the definition of "premises" to include the "space" actually conveyed *and* "the land under and around the buildings." They, however, did not. And to read this additional language into the definition of "premises" is to rewrite the definition in violation of the Court of Appeals' command in *Rodolitz*. *See also*, *425 Fifth Ave. Realty Assoc. v. Yeshiva Univ.*, 228 A.D.2d 178, 178, 643 N.Y.S.2d 542, 543 (1st Dep't 1996) (courts should not interpret contracts to imply what they do not say).

Because the definition of premises does not include "land," it should not be read to encompass soil, groundwater or bedrock. *See British Am. Dev. Corp. v. Fay's Drug Co.*, 178 A.D.2d 801, 801-02, 577 N.Y.S.2d 528, 528-29 (3d Dep't 1991) (where definition of "gross leasable area" failed to include a mezzanine within its scope, it could not be read to include mezzanine); *Steinhardt v. Burt*, 27 Misc. 782, 782, 57 N.Y.S. 751, 751 (App. Term 1899) (where tenant agreed to pay water bills for the "premises," that term had to be read to include *only* the property leased to the tenant and not the land generally).

B. This Definition Of Premises, As Distinguished From Buildings And Land, Persists Throughout The Lease.

Consistent with this interpretation of "premises," other provisions of the Lease distinguish the "premises" IBM was required to return in good order and condition from other kinds of property, such as "buildings," the "parking facility" and "land." For example, the Lease provides that IBM would take "the *premises* 'as is'" (R. at 52, ¶ 2) (emphasis supplied), that SRA had "good marketable fee title to *the building*, *land* and *parking facility*" (*Id.*, ¶ 3) (emphasis supplied), that "the *premises* and *parking facility* and the uses thereof for the purposes specified in this Lease are in conformity with all applicable legal requirements. . . .and that [SRA] will deliver actual possession of the *premises* to the Tenant free of all tenants and occupants." (*Id.*) (emphasis supplied) The Lease further states that SRA would provide IBM "[a]ccess to the *premises* twenty-four (24) hours a day, seven (7) days a week," and IBM promised to "remove ice and snow from the walks, drives and parking facility." (R. at 54, ¶ 5) (emphasis supplied) SRA was required to keep insurance "covering the building and parking facility," but if it purchased broader coverage, it agreed to waive all claims of losses that were covered by its policy arising out of "loss, damage or destruction to the *building*, *premises*, *parking facility* or *contents* thereon or therein." (R. at 56.1, ¶ 10) (emphasis supplied)

With respect to the terms "land" and "premises" in particular, the Lease routinely distinguishes between the "premises" IBM leased and the "land" it did not. For example, the condemnation provisions of the Lease state that "[t]aking by condemnation or eminent domain hereunder shall include the exercise of any similar governmental power and any sale, transfer or other disposition of the *building or land* in lieu or under threat of condemnation. The term '*building*' as used in this Article, shall include the *premises* and *parking facility* and access ways thereto." (R. at 56.1-57, ¶ 11) (emphasis supplied) Similarly, in the section dealing with signs,

IBM agreed that it would "not place any signs on the *land* or exterior of the *building* except as herein provided. The Tenant may place its signs on the entrance doors to the *premises*." (R. at 58, ¶ 13) (emphasis supplied) As to mechanics' liens, SRA agreed to comply with any order or notice "[i]f any order or notice of violation is filed against the *building*, *parking facility*, *premises* or *land*." (R. at 63, ¶ 29) (emphasis supplied) Thus, throughout the Lease, where the parties meant to indicate interior space, they used the term "premises." Where a right or obligation extended beyond the interior space, they used "premises" in conjunction with "land" and "buildings."

Indeed, reading "premises" to mean interior space is the only way to construe the Lease without violating several fundamental principles of contract construction, including the principles that each word in a contract must have meaning and that contracts must be read as reasonable business documents. *See Two Guys From Harrison-N.Y., Inc. v. S.F.R. Realty Assoc.*, 63 N.Y.2d 396, 403, 472 N.E.2d 315, 318, 482 N.Y.S.2d 465, 468 (1984) ("In construing a contract, one of a court's goals is to avoid an interpretation that would leave contractual clauses meaningless."); *Browning-Ferris Indus. of New York, Inc. v. County of Monroe*, 103 A.D.2d 1040, 1040-41, 478 N.Y.S.2d 428, 428-29 (4th Dep't 1984) (contract interpretation has to be fair and reasonable), *aff'd*, 64 N.Y.2d 1046, 479 N.E.2d 247, 489 N.Y.S.2d 903 (1985).

Because a term must have the same meaning throughout an agreement, *see Poughkeepsie Sav. Bank*, 238 A.D.2d at 327, 656 N.Y.S.2d at 918, if the term "premises" were held to include land, soil, bedrock and groundwater (thereby bringing subsurface within the meaning of the good order and condition clause), several provisions of the Lease would contain superfluous terms, would become self-defeating or would impose unreasonable duties on the parties. For example, Article 3 of the Lease, which defines SRA's covenant of marketable title, provides that SRA has

"good marketable fee title to the building, land and parking facility and . . . that the premises and parking facility and the uses thereof for the purposes specified in this Lease are in conformity with all applicable legal requirements." (R. at 52, ¶ 3) If the term "premises" included the land and subsurface, this Article's use of "building, land and parking facility" in its first half, and "premises" in its second would be incredibly clumsy. It should have used "premises and parking facility" throughout. In addition, if the term "premises" included all real property, the Article would place IBM under incredible risk because SRA is *not* required under it to have marketable title to the "*premises*"—the very thing IBM leased. This provision makes sense under IBM's interpretation of the term, however, because there is no such thing as "good marketable fee title" to interior space, just title to buildings and real property. As a result, only IBM's reading of the term "premises" makes sense of the omission of "premises" from the properties listed in the covenant.

Article 13, concerning the use of signs, further demonstrates that "premises" must mean interior space. It provides that IBM could not "place any signs on the land or exterior of the building except as herein provided. [IBM] may place its signs on the entrance doors to the premises and [IBM's] name." (R. at 58, ¶ 13) Under a broad reading of the term premises, this contractual provision, which is intended *to limit* IBM's ability to raise signs, becomes self-defeating. IBM would at once be prohibited from putting signs on "the land" but allowed to place signs on any "entrance doors to the premises," which if "premises" meant "land" might include any number of gates IBM could install on the land to enter the buildings and the front gate to the property.

Article 14 of the Lease provides that SRA would, "*without charge* to [IBM], provide and maintain for the exclusive use of [IBM's] employees and invitees, a parking facility sufficient to

accommodate 82 cars in a paved parking area located in or adjacent to the building as shown on Exhibit A." (R. at 58, ¶ 13) (emphasis added) If, as the lower court suggested, the term "premises" incorporated all the properties described in the Lease, this Article would contradict the body of the Lease because the parking facilities would have been part of the leased "premises" and thus not free at all.

Similarly, Article 29, pertaining to mechanics' liens begins, "[i]f any order or notice of violation is filed against the building, parking facility, premises or land . . . ." (R. at 63, ¶ 29) If "premises" were to include "land," the use of the term "land" in this provision would be meaningless, or this provision would contain a redundancy.

Finally, Exhibit B would impose an irrational requirement on SRA if "premises" were to include "land." The first sentence in Exhibit B states that "[SRA] shall provide winter humidification throughout the premises and common areas." (R. at 67) If "premises" were to include all soil, groundwater and bedrock, the Lease would have required—by using the term "shall"—SRA to humidify the soil, bedrock and groundwater. Surely, SRA would not contend that it had such a draconian obligation under the Lease.

By reading "premises" to mean, as IBM argues, only space, all of these contractual anomalies are avoided. Indeed, adopting this reading is the only way to avoid them. Accordingly, IBM's reading is the superior interpretation of the term. *See A.J. Cerasaro, Inc. v. State*, 97 A.D.2d 598, 598-99, 468 N.Y.S.2d 204, 204-05 (3rd Dep't 1983) (refusing to adopt reading of term that made contract unreasonable); *Ditmars-31 St. Dev. Corp. v. Punia*, 17 A.D.2d 357, 362-63, 235 N.Y.S.2d 796, 801-02 (2d Dep't 1962) (rejecting definition of term that made contract strained and an unreasonable business document).

C. The 1984 Agreement Further Demonstrates That IBM Was Not Required Under The Lease To Return Soil, Groundwater And Bedrock In Good Order And Condition.

To the extent any doubt about the meaning of "premises" and IBM's obligations under the Lease remains, it is dispelled by the 1984 Agreement between IBM and SRA. The 1984 Agreement contains an acknowledgment that IBM contaminated the soil, groundwater and bedrock, and sets forth how IBM would remediate that contamination. Specifically, the Agreement provides that "IBM has undertaken remedial action to remove soil containing said chemicals" and "accepts total responsibility for preventing damage to the building structures and appurtenances as a result of said removal." (R. at 68, ¶ 2) IBM promised to "abate any pollution resulting from the presence of such chemicals to the satisfaction of all requisite governmental agencies." (R. at 69, ¶ 4) Moreover, "[s]ubsequent to the abatement of the chemical pollution IBM agree[d] to restore the premises to their condition existing prior to said abatement effort. Restoration shall include, but is not limited to, reconstruction of the buildings and appurtenances, if necessary, unless said buildings were voluntarily razed by the owners." (*Id.*) Finally, pursuant to this Agreement, IBM indemnified SRA against "any and all claims or judicial or administrative proceedings against [SRA] arising out of or relating to the presence of such chemicals or IBM's action in their removal." (R. at 68-69, ¶ 3) All of these obligations expressly survive the termination of IBM's lease and extend to SRA's heirs, successors and assigns. (R. at 69, ¶ 5)

These provisions clearly demonstrate, and it cannot be seriously argued otherwise, that the 1984 Agreement defines obligations of IBM with respect to the contamination. The upshot of this fact is four-fold:

First, this Agreement proves that, unlike today, SRA did not, in 1984, read the good order and condition clause to require IBM to remove every molecule of chemicals from the soil, groundwater and bedrock. That is, the 1984 Agreement places *far narrower* duties on IBM than SRA now claims IBM has under the Lease. For example, it does not require IBM to rebuild buildings that are voluntarily razed by SRA, which SRA now contends is IBM's duty under the Lease. (*Id.* ¶ 4, final sentence) And the 1984 Agreement requires IBM only to comply with state and federal law, not to remove all traces of chemicals. (*Id.* ¶ 4) By entering into a more specific and narrower remediation agreement, SRA risked modifying or waiving its rights under the Lease. *See infra* pp. 21-22; *see also Kalimian v. Olson*, 130 Misc. 2d 861, 867-68, 498 N.Y.S.2d 690, 696 (Sup. Ct. N.Y. 1986) (holding landlord waived breach of lease claim after it obtained knowledge of breach and tenant's detrimental reliance).

Surely, SRA would not have risked modifying its supposedly sweeping rights under the Lease had it believed in 1984—a date far closer in time to the execution of the Lease than today—that the Lease offered greater protection than the 1984 Agreement. Had SRA then believed that the good order and condition clause would provide a complete and more sweeping remedy, it would have had no incentive to enter into the 1984 Agreement. SRA's entering into the 1984 Agreement is thus evidence (contemporaneous with and closer in time to the execution of the Lease) that it did not view the Lease as providing a remedy, and thus is strong evidence of the true intent underlying the Lease's good order and condition clause. *See Canick v. Canick*, 122 A.D.2d 767, 768, 505 N.Y.S.2d 652, 653 (2d Dep't 1986) (parties' conduct contemporaneous with agreement's execution is best evidence of intent).

Second, the 1984 Agreement bolsters IBM's interpretation of the Lease because that interpretation is the only one that gives meaning to the Agreement. Under SRA's broad reading

of the term "premises," the good order and condition clause requires IBM to eliminate all trace chemicals. If this reading were correct, the specific, and more limited, abatement obligations IBM undertook in the 1984 Agreement would be superfluous. The 1984 Agreement would have been subsumed by the Lease from the moment it was entered, and thus never had a purpose. All provisions of contracts, however, must have purpose and meaning. *Loctite VSI Inc. v. Chemfab N.Y. Inc.*, 268 A.D.2d 869, 871, 701 N.Y.S.2d 723, 723 (3d Dep't 2000) ("[C]ourts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect.").

Third, it is a general rule of contract construction that the specific should supersede the general. *See Isaacs v. Westchester Wood Works, Inc.*, 278 A.D.2d 184, 185, 718 N.Y.S.2d 338, 339 (1st Dep't 2000) (under the rule of *ejusdem generis,* a court should give precedence to a specific contract clause over an arguably conflicting general provision); *John Hancock Mut. Life Ins. Co. v. Carolina Light & Power Co.*, 717 F.2d 664, 670 n.8 (2d Cir. 1983) ("New York law recognizes that definitive, particularized contract language takes precedence over expressions of intent that are general, summary, or preliminary."). The 1984 Agreement, as the more specific statement of IBM's duties with respect to the contamination, should thus control the general "good order and condition" clause.

Fourth, if the Court were to conclude that the Lease's good order and condition clause covers soil, groundwater and bedrock, the 1984 Agreement would necessarily be a modification of that clause or waiver of SRA's rights under it. "The modification of a contract results in the creation of a new contract between the parties which *pro tanto* supplants the affected provisions of the original agreement while leaving the balance of it intact." *Cappelli v. State Farm Mut. Auto. Ins. Co.*, 259 A.D.2d 581, 582, 686 N.Y.S.2d 494, 494 (2d Dep't 1999); *Tejani v. Allied*

Princess Bay Co., 204 A.D.2d 618, 620, 612 N.Y.S.2d 227, 228-29 (2d Dep't 1994); *Beacon Terminal Corp. v. Chemprene, Inc.*, 75 A.D.2d 350, 354, 429 N.Y.S.2d 715, 717-18 (2d Dep't 1980). In *Muzak Corp. v. Hotel Taft Corp.*, 1 N.Y.2d 42, 133 N.E.2d 688, 150 N.Y.S.2d 171 (1956), the Court of Appeals held that specific terms in a modification agreement control over any arguably inconsistent general terms in the original agreement. The Court reasoned that its holding was consistent with both the purpose of the modification agreement and well-established rules of contract construction. *Id.* at 47-48, 133 N.E.2d at 690, 150 N.Y.S.2d at 174. The 1984 Agreement specifically details the manner in which IBM was required to abate the contamination. It expressly contemplates that IBM's Lease would terminate and imposes precise and exacting standards that IBM must follow in that event. Importantly, SRA has not, and cannot, allege that IBM has failed to meet those standards. To date, IBM has fulfilled every condition in the 1984 Agreement and returned the soil, bedrock and groundwater to SRA in a manner that comports entirely with the Agreement's requirements. Accordingly, IBM has clearly satisfied the "good order and condition" as modified by the 1984 Agreement.

II. THE LOWER COURT'S CONTRARY ANALYSIS IS WRONG.

Instead of beginning its analysis where it should have—the meaning of the term "premises" in the good order and condition clause—the lower court focused on a red herring, namely the scope of IBM's bargained for use and service rights. The court also invoked the judicial estoppel doctrine, stating that IBM could not now disclaim responsibility under the Lease because (according to the court) it had previously acknowledged leasing the soil, groundwater and bedrock. This analysis is erroneous, and no ground asserted by the lower court supports its decision.

A. The Extraneous Rights And Duties Cited By The Lower Court Do Not Inform The Meaning Of The Good Order And Condition Clause.

At the outset, it is important to note that the lower court never attempted to discern the meaning of the term "premises" as it is used in the good order and condition clause. It never examined the contractually-provided definition of "premises" or even commonly-understood definitions of the term. Rather, the lower court based its decision, primarily, on the fact that "the lease, when read as a whole, [is not] limited to floor space only." (R. at 15) The lower court cited provisions conferring on IBM the right to use storage and parking facilities, as well as provisions requiring IBM to pay certain real estate taxes, and repair damage to the parking facility. Based on the content of *these* provisions, the lower court concluded that "[t]he whole document conveys to IBM rights, obligations, use and occupancy of a leasehold that extends beyond space referenced in the document's single precatory paragraph." (*Id.*)

The lower court's analysis confuses IBM's rights under the Lease generally with its particular obligation to return in good order and condition *only* the "premises." To be sure, the Lease covers numerous topics beyond IBM's rights and duties with respect to the "premises." It defines IBM's rights and duties over facilities to which IBM was given limited use rights. It defines IBM's rights and duties as to appurtenances and a water tower, which IBM also leased but are not within the definition of the term "premises." (R. at 51) What the lower court failed to appreciate, however, is that these rights and duties are, without more, irrelevant because they do not inform the meaning of the term "premises." And the good order and condition clause extends *solely* to the "premises," not to the parking facility, not to walkways, not to appurtenances, and certainly not to land. Thus, whether IBM had a right to use a parking facility or a duty to repair that facility, in and of itself, has no bearing on whether IBM was obligated to return that facility in good order and condition.

A simple example illustrates the point. It is not atypical for apartment leases to contain terms that create rights and duties of the tenant extending beyond the leased premises. For example, an apartment lease might grant a tenant the right to use common areas, such as walkways, elevators, decks, or a pool. The lease might further contain limitations on those use rights, such as hours and noise restrictions, or even conditions on use, such as an agreement not to bring glass into the pool area. But simply because the tenant has those limited, conditional use rights does not, in and of itself, mean that the tenant is required under the lease to return the common areas "in good order and condition." That duty is determined exclusively by the terms of the "good order and condition" clause. If the clause requires the tenant to return *only* his interior apartment space in good order and condition, any damage the tenant may have done to the common areas or pool is governed, not by that clause, but by other principles of law, such as tort law or other principles of property law. *See, e.g., Syracuse Cablesys., Inc. v. Niagara Mohawk Power Corp.*, 173 A.D.2d 138, 141-43, 578 N.Y.S.2d 770, 771-73 (4th Dep't 1991) (discussing tort claim for damage to property caused by explosion); *P.B.N. Assoc. v. Xerox Corp.*, 141 A.D.2d 807, 808-09, 529 N.Y.S.2d 877, 878-79 (2d Dep't 1988) (holding that damage to non-leased areas breached warranty clause, which the Lease between SRA and IBM lacks); *P.B.N. Assoc. v. Xerox Corp.*, 136 Misc. 2d 205, 208-09 517 N.Y.S.2d 1015, 1018 (Sup. Ct. Rockland 1987) (discussing elements of "common law waste" claim by landlord against tenant for contamination caused by tenant).

Here, after the give and take of negotiation, SRA and IBM agreed that IBM would have certain use rights extending beyond the premises it leased (such as the right to use a parking facility, common areas, and walkways). The parties also placed conditions and restrictions on those rights (such as IBM would have to remove snow from these areas and provide security for

them). But the parties agreed that, as a matter of *contract*, IBM was required to return only "the premises," that is the interior space, not the other areas, in good order and condition.

The lower court's conclusion that the Lease covered areas beyond interior building space is thus completely irrelevant to, and fails to support, its conclusion that these other areas had to be returned in good order and condition. They only fall within the scope of that clause if they were within the definition of the term "premises." Every textual indicator in the Lease, however, proves otherwise. The parties consistently distinguished between the "premises" and the other areas mentioned in the Lease. *See supra* pp. 15-19.

Although the rights and duties cited by the lower court do not inform IBM's obligations under the good order and condition clause, these provisions do confirm IBM's reading of the definition of "premises." All of the provisions cited by the lower court, distinguish premises, buildings, land, and other facilities. (R. at 14-15) Accordingly, if anything, these provisions *confirm* IBM's interpretation of the term.

B. Extrinsic Evidence Of IBM's Use Rights Does Not Inform The Meaning Of The Good Order And Condition Clause.

The lower court next held that to the extent the Lease's provisions do not unambiguously demonstrate that "IBM's use and occupancy of the site extend[ed] well beyond floor space," extrinsic evidence (such as IBM's actual use of common areas, and its past removal of snow from those areas) demonstrated these use rights. (R. at 15-16) This holding is, for all intents and purposes, the same as the court's first holding and suffers from the same fatal flaw: simply because IBM had the right *to use* facilities beyond the leased premises does not mean that it was required by the Lease to return those facilities in "good order and condition." Again, absent any textual indicator that the parties meant "premises" to encompass these other areas, they do not fall within the scope of the good order and condition clause.

C. IBM's Use Of An Underground Storage Tank Does Not Demonstrate Some Duty To Return The Soil, Bedrock And Groundwater In Good Order And Condition.

The lower court also cited IBM's use of the underground storage tank (the tank that leaked) as evidence that it had a contract-based right to use that tank. Specifically, the court held:

> It is uncontested from the Record that IBM utilized underground storage facilities, but now argues in incongruous fashion that it had no contract-based right from which to do so. IBM cannot have its cake and eat it too. If IBM's lease interpretation is taken to its logical conclusion, then IBM arguably breached the defined limitations of its lease with SRA in the use of underground storage facilities. . . .

(R. at 16) The lower court's reasoning is erroneous and clearly demonstrates the court's misunderstanding of the Lease and IBM's argument.

At the outset, this reasoning is completely out of touch with the argument of the parties. No one, not even SRA, has claimed that IBM lacked a right to use the underground storage tank, and SRA has never asserted a claim against IBM for any supposed misuse of the tank. Any claim that IBM breached its Lease by using the storage facility is simply not asserted in this litigation and cannot be successfully pressed against IBM now.

In any event, the court's logic is seriously flawed. There is nothing in the record to suggest that IBM used the storage tank *during the term of the Lease*. IBM conducted operations at 622 South Road starting in the 1950s, and prior to 1981, its leasehold interest was defined *by a different lease*. It is thus possible that IBM leased and used the storage tank before 1981 under a different lease arrangement but had no leasehold interest in it, and did not use it, after 1981.

Alternatively, the Lease can be read to confer on IBM a contractually-defined right to use the underground tank.[3] But such a use right would not, by itself, place a duty on IBM to return the underground storage tank in "good order and condition." That requirement extended only to the "premises" leased by IBM, and an underground storage facility does not fall within the definition of "premises"—*space in the buildings*.

Finally, even if IBM leased the tank, that would not mean that it leased the soil, bedrock and groundwater under it. The lower court failed to explain (and SRA cannot explain) how the lease of one necessarily implies lease of the other.

Accordingly, IBM is not trying to "have its cake and eat it too." (R. at 16) It is simply trying to enforce the bargain it struck with SRA—which requires IBM to return only the "premises," not common areas or real property, in good order—rather than be held to the expansive good order and condition clause the court read into the Lease.

D. IBM Is Not Judicially Estopped From Arguing That The Term "Premises" In The Good Order And Condition Clause Does Not Encompass Soil, Bedrock And Groundwater.

Turning from the terms of the Lease, the lower court held that IBM had "in other judicial and administrative proceedings held itself out as the tenant and operator of the broadly-defined real property at 622 South Road," and could "not be permitted to take inconsistent legal positions from forum to forum." (R. at 16) The first "other proceeding" cited by the lower court was the administrative action before NYSDEC to reclassify the site from Class 2 to Class 4. (R. at 16-17) The second was the RCRA Action before the Southern District of New York and the appeal to the Second Circuit. (R. at 17) The third proceeding named by the lower court was an earlier

[3] That right is based in Article 5(a)(10) of the Lease, which allows IBM to use facilities for loading and unloading activity; the storage facility was a place to house chemicals before they were loaded and transported to a disposal facility. (R. at 55, 290)

proceeding in this litigation before a *different justice* (Justice Beisner), in which IBM successfully moved to dismiss SRA's unjust enrichment claim. (*Id.*)

The lower court's reading of the documents and briefs submitted in these proceedings is plainly incorrect. IBM did not, in any of them, represent that it leased soil, bedrock or groundwater, and it certainly did not contend that soil, groundwater and bedrock constitute "premises" within the meaning of the good order and condition clause. Each proceeding will be considered in turn.

1. The NYSDEC Reclassification

The principle of judicial estoppel precludes a litigant "who assumed a certain position in a prior legal proceeding *and who secured a judgment in his or her favor* from assuming a contrary position in another action simply because his or her interests have changed." *Wootton v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 176, 674 N.Y.S.2d 280, 286 (1st Dep't 1998) (emphasis in original) (internal citation omitted) (law firm's judicial estoppel argument labeled "disingenuous"). The estoppel doctrine will not apply where a judgment was not obtained in the earlier proceeding, or where the judgment was not *the result of* the party's prior inconsistent position. *Tilles Inv. Co. v. Town of Oyster Bay,* 207 A.D.2d 393, 394, 615 N.Y.S.2d 895, 895 (2d Dep't 1994) (affirming trial court's finding that judicial estoppel was inapplicable where inconsistent position in prior action did not result in a favorable judgment); *Malamut v. Doris L. Sassower, P.C.*, 171 A.D.2d 780, 781, 567 N.Y.S.2d 499, 501 (2d Dep't 1991) (reversing trial court's imposition of judicial estoppel, finding that validity of a retainer agreement was not necessarily determined in prior proceeding for recovery of attorney's fees); *Kalikow 78/79 Co. v. State*, 174 A.D.2d 7, 577 N.Y.S.2d 624 (1st Dep't 1992).

The lower court reasoned that IBM was judicially estopped from claiming that it did not lease the soil, bedrock and groundwater because, otherwise, it would not have had standing to seek from NYSDEC a reclassification of SRA's property. This reasoning is both wrong as a matter of standing law and is not a proper application of the judicial estoppel doctrine.

Contrary to the lower court's suggestion, IBM did *not* represent to NYSDEC that it leased the soil, bedrock and groundwater. It observed in its petition that it leased space in the buildings but made no representation as to ownership or operation of the subsurface. (R. at 282, ¶ 1.1.1) Nonetheless, the lower court concluded that IBM had *implicitly* represented that it leased the site's subsurface because IBM would not have had standing to seek reclassification unless it owned or operated the soil, bedrock and groundwater. This is wrong as a matter of law.

Under the applicable New York rules and regulations "a person who is a responsible party by reason of being the current or former owner or operator of a site has standing to make a petition" for reclassification of a site. N.Y. Comp. Codes R. & Regs., Title 6, § 375-1.9(a). A "responsible party by reason of being a current or former owner or operator" is defined as either

> (1) the current owner and the current operator of the site or any portion thereof; [or]
>
> (2) the owner, and the operator, of the site or any portion thereof at the time any hazardous waste disposal occurred;

N.Y. Comp. Codes R. & Regs., Title 6, § 375-1.3(u) (2002). The same regulation goes on to define a "site" as "any area or structure *used for the long-term storage* or final placement of hazardous waste including, but not limited to, dumps, landfills, lagoons, and artificial treatment ponds. . . ." *Id.* § 375-1.3 (emphasis added).

Thus, as a matter of New York law, to have standing to petition NYSDEC, IBM did not need to own or operate the groundwater, bedrock or soil. Indeed, it did not need to have any leasehold interest in them at all. It had standing merely by operating some portion of the larger

site at the time of the contamination. IBM has always maintained that its use of the underground storage tank caused the contamination. And this mere *use of the tank* was sufficient to confer standing upon it.

Because IBM can consistently admit to using the tank and claim that the soil, bedrock and groundwater are still not "premises" within the meaning of the Lease, *see supra* pp. 23-25, the judicial estoppel doctrine is inapplicable to the NYSDEC petition. *See BNP Paribas (Suisse) S.A. v. Chase Manhattan Bank*, 298 A.D.2d 167, 168, 748 N.Y.S.2d 358, 360 (1st Dep't 2002) *In re Thrift Ass'n*, 255 A.D.2d 809, 812-13, 680 N.Y.S.2d 746, 749 (3d Dep't 1998) (representations must be actually inconsistent for judicial estoppel to apply); *Bellevue South Assocs. v. HRH Constr. Corp.*, 184 A.D.2d 221, 221, 585 N.Y.S.2d 191, 191-92 (1st Dep't 1992).

Even if the lower court's view of standing law were correct, judicial estoppel would still not apply here. IBM's petitioning of NYSDEC is not the kind of legal proceeding to which the judicial estoppel doctrine applies. The New York courts do not apply judicial estoppel to proceedings, like the reclassification petition, which have no hearing and do not involve a dispute by adversarial parties. *See, e.g.*, *Ferring v. Merrill Lynch & Co.*, 244 A.D.2d 204, 204-05, 664 N.Y.S.2d 279, 280 (1st Dep't 1997) (assertions in application to an administrative body not kind of assertions to which judicial estoppel applies); *Tozzi v. Long Isl. R.R. Co.*, 170 Misc. 2d 606, 613-14, 651 N.Y.S.2d 270, 275-76 (Sup. Ct. Nassau 1996) (administrative action that was decided after party submitted a letter, without a hearing, is not a judicial proceeding to which estoppel could apply), *aff'd*, 247 A.D.2d 466, 668 N.Y.S.2d 102 (2d Dep't 1998).

Finally, the application of judicial estoppel is inappropriate because IBM made no factual representation in the reclassification petition concerning ownership of soil, groundwater or

bedrock. It submitted the petition based on its reasonable reading of New York law that operation of the tank was sufficient to confer standing upon it. If IBM incorrectly interpreted environmental regulations, and in fact it did not have standing, this would be a *misinterpretation* of the law, not an inconsistent *representation* of the law or underlying facts. An erroneous legal belief, however, is not the kind of representation necessary to support application of the judicial estoppel doctrine. *See Excelsior 57th Corp. v. Kern*, 218 A.D.2d 528, 529-30, 630 N.Y.S.2d 492, 494 (1st Dep't 1995); *Piedra v. Vanover*, 174 A.D.2d 191, 197, 579 N.Y.S.2d 675, 679 (2d Dep't 1992); *see also Pisciotta v. Lifestyle Designs, Inc.*, 299 A.D.2d 403, 404, 749 N.Y.S.2d 429, 430 (2d Dep't 2002) (holding judicial estoppel inapplicable because "plaintiffs did not assert, as true, *a fact* that they had disproven in a prior proceeding.") (emphasis supplied).

2. The RCRA Action And Appeal

The lower court also viewed IBM as having "consistently described its status as the lessee and the occupier of real property" in the RCRA Action. (R. at 17) On this score, it is unclear what the lower court was reading when it reached this conclusion. Its opinion contains no cite to the record, and the record contains only three pages of actual argument from IBM's briefs in the RCRA Action. (R. at 167-68, 171)

Presumably, the court relied on SRA's reading of the briefs and opinions in the RCRA Action. SRA's "proof" that IBM described itself as leasing real property was a single sentence in IBM's Motion to Dismiss the RCRA Action, which states that SRA "leased real property in Poughkeepsie, New York to [IBM] for nearly twenty years" and that "SRA re-took possession of the property pursuant to a written agreement with IBM." (SRA Mem. of Law at 22) This, however, is not an admission that the term "premises" includes soil, groundwater, and bedrock. It merely states the obvious—that IBM leased real property, namely the interior building space.

In addition, this sentence is not the kind of clear assertion of fact that supports the application of judicial estoppel. It is, at best, a single ambiguous use of language in a lengthy brief. *See Inter-Power of N.Y. Inc. v. Niagara Mohawk Power Corp.*, 208 A.D.2d 1073, 1075, 617 N.Y.S.2d 562, 564 (3d Dep't 1994) (refusing to impose of judicial estoppel where "passages cited in defendants' brief and motion papers are somewhat ambiguous and do not clearly convey plaintiff's alleged position on this point").

Even if a statement in IBM's briefs could somehow be contorted to constitute an admission that "premises" means soil, bedrock and groundwater, it could not be the basis for the application of judicial estoppel. The Southern District dismissed the RCRA Action on the ground that SRA failed to allege *current acts* of contamination, as required under the Act. (R. at 427) The Second Circuit affirmed on this same ground. *SRA*, 216 F.3d at 256. What IBM may or may not have leased is *completely* irrelevant to whether there were then-current acts of contamination at the property. Because judicial estoppel does not apply unless the inconsistent statement of fact was *necessary to the court's decision*, it cannot be applied to any statements about IBM's leasehold interest in the RCRA action. *Tilles Inv. Co.*, 207 A.D.2d. at 394, 615 N.Y.S.2d at 895-96; *Malamut*, 171 A.D.2d 780, 780-81, 567 N.Y.S.2d at 501; *see also Lory v. Parsoff*, 296 A.D.2d 535, 536, 745 N.Y.S.2d 218, 219 (2d Dep't 2002) (rejecting application of judicial estoppel where the party "did not secure favorable relief . . . *as a result of* his adopting a contradictory position") (emphasis supplied); *European Am. Bank v. Miller*, 265 A.D.2d 374, 374, 697 N.Y.S.2d 82, 83 (2d Dep't 1999) (same).

Finally, in light of the procedural posture of the federal court action, judicial estoppel is inappropriate. The RCRA Action was decided on a motion to dismiss. As the Second Circuit observed,

> [b]ecause the District Court dismissed SRA's complaint on the pleadings, we assume that all of SRA's factual allegations are true and draw all reasonable inferences in SRA's favor.

SRA v. IBM, 216 F.3d at 252. Accordingly, all references to fact in the courts' opinions and in IBM's briefs necessarily accept, as true, *SRA's view of the facts*. The recitations do not represent IBM's statement of fact.[4]

3. Unjust Enrichment Decision

The last ground for judicial estoppel cited by the lower court was IBM's successful argument to a *different* Justice that the unjust enrichment claim should be dismissed. According to the court, IBM represented in its earlier papers that "SRA possessed a remedy in law on a contract claim." (R. at 17) But Justice Dillon's interpretation of IBM's papers and Justice Beisner's opinion for the court does not comport with the papers' and opinion's texts. With respect to the unjust enrichment claim, IBM argued that:

> SRA's Amended Complaint fails to state these basic elements. SRA attempts to plead that it conferred a benefit upon IBM by alleging that "[b]y walking away from the contamination" "IBM bore the cost of neither proper disposal nor the subsequent clean-up of the Property. Am. Compl. ¶ 49. But this assertion is really nothing more than a claim that IBM failed to comply with applicable environmental laws; it does not describe any benefit conferred upon IBM by SRA. . . .
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> Further, even if Plaintiff had pled the required elements of a claim for unjust enrichment, which IBM denies, a claim for unjust enrichment only lies where plaintiff has no adequate remedy at law. Here, Plaintiff's claim should be dismissed because SRA's claim for breach of contract provides an adequate remedy at law. Plaintiff's first cause of action is for breach of a written lease agreement that IBM and Plaintiff entered into in 1981 (the "Lease"). . . . IBM does not dispute the validity or existence of the Lease.**[FN]** Where, as here, a plaintiff sues to enforce a valid and

[4] For all the same reasons, the lower court's passing reference that IBM has described itself as having leased the soil, groundwater and bedrock in the state courts is erroneous.

> enforceable written contract governing a particular subject matter, he or she cannot recover in quasi-contract for events arising out of the same subject matter.

(R. at 158-59) (internal citations omitted)

Importantly, in the indicated footnote, IBM states the following: "*IBM does dispute that there was a breach of the Lease or that SRA is entitled to any damages for alleged breach.*" (R. at 159 n. 3) (emphasis supplied) Underscoring this point, an earlier footnote in the same brief (R. at 157 n.1) provides that "IBM does *not* concede that it has breached any provision of the lease, or that SRA is entitled to any damages." (emphasis supplied; *see also* R. at 153 n.1 (stating same in IBM's initial motion to dismiss, which was later withdrawn)) The lower court completely ignored these footnotes.

In light of the actual text of its brief, IBM's position with respect to unjust enrichment is clear. It sought dismissal of the claim primarily on the ground that SRA failed to allege that it had conferred a benefit on IBM. In the alternative, IBM argued that SRA could not simultaneously argue that it had no adequate remedy at law and assert a contract claim seeking a remedy at law for the same conduct, particularly when that contract was valid and enforceable. IBM did not concede that SRA would prevail in the contract action. To the contrary, *IBM specifically stated that it disputed whether the Lease had been breached and whether SRA was actually entitled to damages.* (R. at 153 n. 1; R. at 157 n. 1; R. at 159 n. 3) Given this clear and express statement, IBM's briefs cannot be read as an admission that SRA would prevail on the contract claim, as the lower court suggested.

Justice Beisner's opinion demonstrates that the court understood IBM's position in exactly this manner. The court held that SRA's unjust enrichment claim should be dismissed because SRA

> [did] not allege that it conferred a benefit on IBM. SRA asserts that IBM was benefitted because it avoided the expense of proper disposal and remediation at the Property, at SRA's expense. SRA does not allege, however, that it paid for the disposal or remediation. Put another way, SRA alleges that IBM has benefitted because IBM walked away from contamination for which SRA will ultimately bear the cost, either through clean-up expenses or the diminished value of SRA's Property. However it is worded, this is not a benefit which SRA has conferred upon IBM.

(R. at 164) In the alternative, the court observed that SRA's claim would have to be dismissed because it was seeking "quasi-contractual recovery," which "[a] valid written contract" would preclude. (R. at 165) "Since the parties have a Lease agreement, the existence or validity of which is not disputed, SRA's cause of action based on unjust enrichment cannot be maintained." (*Id.*)

Like IBM, the court did not conclude that SRA's unjust enrichment claim should be dismissed because SRA *would prevail* on its contract claim. Rather, it held that SRA could not *simultaneously* pursue the unjust enrichment and contract claims because its mere assertion of a contract claim was inconsistent with its position that it had no remedy at law. This holding is completely consistent with IBM's claim now that SRA should not prevail on its contract claim.

In any event, because the portion of Justice Beisner's opinion that troubled the lower court was an alternative holding, it is insufficient to constitute the basis for application of judicial estoppel. The court dismissed the unjust enrichment claim, first and foremost, because SRA failed to plead the elements of the claim, in particular failed to demonstrate that SRA had conferred a benefit on IBM. (R. at 164) The court stated only in the alternative that SRA had an adequate remedy at law. Accordingly, the court's dismissal of the unjust enrichment claim was not caused by IBM's alternative argument. *See Tilles Inv. Co.*, 207 A.D.2d. at 394, 615

N.Y.S.2d at 895; *Malamut*, 171 A.D.2d 780, 567 N.Y.S.2d at 501; *Lory*, 296 A.D.2d at 536, 745 N.Y.S.2d at 219; *European Am. Bank v. Miller*, 265 A.D.2d at 374, 697 N.Y.S.2d at 83.

E. The 1984 Letter Agreement Demonstrates The Parties Intended IBM To Abate The Property Only To The Standards Set By State And Federal Law.

In the last two portions of the lower court's decision, the court rejects IBM's argument that the 1984 Agreement could be read to supplant or modify any duties IBM might have had under the Lease. (R. at 18-20) The court reasoned, first, that although the 1984 and 1994 Agreements "might negate any claim SRA might otherwise have possessed for property damages and/or monetary damages arising out of remedial costs that SRA would have incurred, they do not by their express terms address other forms of consequential damages arising from the contamination, including alleged diminished rent or property values for which damages are sought in SRA's amended complaint." (R. at 19) The court held, second, that the 1984 Agreement could not be read as a modification to the Lease because it contained no language expressing the parties' intent to modify the contract. (R. at 19-20)

At the outset, the court's reasoning does not undercut the fact that the 1984 Agreement is *at least* persuasive evidence, closer in time to the date the Lease was entered than today, of the parties' understanding of the Lease. SRA would never have entered the Agreement had it viewed the good order and condition clause, at that time, in the manner it asserts today. *See supra* pp. 20-21. In addition, the lower court nowhere explains how the 1984 Agreement can serve any purpose if the good order and condition clause covers damage caused by contaminating soil, groundwater and bedrock.

In any event, the lower court's conclusion is wrong because the 1984 Agreement, by its terms, demonstrates the parties' intent to modify any duty IBM might have had to eliminate all chemicals from the soil, groundwater and bedrock. It provides as follows:

- IBM will "abate *any* pollution"—not just soil contamination between the buildings, but *any* pollution—resulting from the presence of the "organic chemicals," "to the satisfaction of all requisite governmental agencies." (R. at 69, ¶ 4) (emphasis added) This term specifically changes any requirement inferred from Article 7 of the Lease that IBM remove every molecule of contamination, or render the property "free of contaminants."

- The parties expressly recognized and agreed that removal of any remaining contaminated soil (including soils beneath the buildings) *might not be necessary*. Paragraph 4 states: "*In the event* the abatement of the pollution requires removal of the contaminated soil, ..." (*Id.* at ¶ 4) Thus, the parties agreed that abatement to the satisfaction of governmental agencies *might not require* the removal of the soil under the buildings.

- The 1984 Agreement establishes that state and federal environmental agencies, not SRA or courts, will determine whether contaminated soils beneath the buildings would have to be removed. (*Id.*) In addition, it sets forth the parties' agreement and understanding regarding IBM's obligation to reconstruct the buildings. If the government ordered that the buildings be razed to remove the contaminated soils, IBM would be required to reconstruct them. If, however, the owners voluntarily razed the buildings at some point in the future, then, while IBM would be required to abate any remaining soil contamination to the satisfaction of the government, IBM would not be required to reconstruct the buildings:

> *In the event the abatement of the pollution requires the removal of the contaminated soil*, such soil shall be replaced in accordance with the standards acceptable to all requisite governmental agencies. Subsequent to the abatement of the chemical pollution IBM agrees to restore the premises to their condition existing prior to said abatement effort. *Restoration shall include, but is not limited to, reconstruction of the buildings and appurtenances, if necessary, unless said buildings were voluntarily razed by the owners*. (*Id.*) (emphasis added).

In light of these very specific terms that changed what SRA now asserts are IBM's duties under the Lease, the 1984 Agreement can only be read as an agreement setting forth the parties' understanding about the scope of IBM's clean-up obligations.

Finally, the lower court erroneously concluded that the good order and condition clause of the Lease could not have been modified by the 1984 Letter Agreement because such a modification was barred by Article 36 of the Lease. (R. at 18-19) Article 36 provides only that the Lease "may not be modified except by an instrument in writing which is signed by both

parties." (R. at 65) Because the 1984 Agreement is written and signed (R. at 69), it satisfies this condition.

F. The Lower Court's Decision Threatens Unnecessarily To Skew Contract Law.

If this Court were to affirm the lower court's decision, the resulting precedent would not only depart from the plain meaning of the Lease's terms but also have serious negative consequences on property law. To affirm, this Court would have to read the Lease's good order and condition clause to extend to all property the Lease mentions (and some it does not), regardless of whether that property is actually named in the good order and condition clause. Such precedent would expose tenants who have entered into standard lease agreements to breathtakingly expansive liability that they could not have contemplated when entering into those leases.

Tenants could become responsible by contract for damage to common areas, such as walkways, docking facilities, driveways, and the like, even if the good order and condition clause in their lease does not purport to cover these areas. The mere fact that the lease contemplates the use of other property would, if the lower court's analysis were adopted, be sufficient to prove the parties' intent to broaden the good order and condition clause. Indeed, the more ambiguous the good order and condition clause, the more expansive a tenant's duties would become. If, for example, a good order and condition clause were to provide simply "the tenant shall return property in good order and condition," a tenant could become liable for damages caused by third parties to common areas simply because the lease grants the tenant a right to use those areas. *See, e.g.*, *Bushwick Realty Co. v. Sanitary Fireproofing & Contracting Co.*, 129 A.D. 533, 534, 114 N.Y.S. 13, 14 (2d Dep't 1908) (holding that clause requiring tenant to return premises in "good order" meant that tenant had to repair damage to that premises regardless of cause).

There is, however, no reason to risk creating new and unforeseen liability given IBM's conduct in this case and the alternative legal theories available to landlords. Here, IBM has not left the contamination unabated or ignored its responsibility for the contamination. To the contrary, it has undertaken a costly program to remove the contamination and return the property to a condition that complies with all state and federal environmental laws. It has also relieved SRA, its successors and assigns from any and all future liability for the contamination. (R. at 68-72) There is no risk to the public or SRA from the contamination, and no urgent situation exists that might persuade one to abandon traditional principles of contract construction in order to extend liability to IBM.

Adopting a broad reading of good order and condition clauses, moreover, is not necessary to create a remedy for landlords injured by tenant contamination. There are numerous causes of action landlords can pursue. For example, landlords can file trespass claims, claims under federal and state environmental laws, common law waste claims, or tort claims, *see Syracuse Cablesys., Inc.*, 173 A.D.2d at 141-43, 578 N.Y.S.2d at 771-73; *P.B.N. Assoc. v. Xerox Corp.*, 136 Misc. 2d at 208-09, 517 N.Y.S.2d at 1018, or they may include warranty clauses in their leases under which tenants warrant not to violate environmental laws, *see P.B.N. Assoc. v. Xerox Corp.*, 141 A.D.2d at 808-09, 529 N.Y.S.2d at 878-79.

SRA could have pursued these causes of action had it filed timely claims against IBM. It did not. Indeed, after SRA learned of the contamination, it did not even seek to evict IBM or sue it for the damages caused by the contamination. Instead, SRA *renewed* its lease with IBM and entered into the 1984 Agreement, which imposes numerous, burdensome obligations on IBM, including a duty to indemnify SRA forever. (R. at 68-69) On these facts, SRA cannot now be heard to complain about the contamination. *Kalimian*, 130 Misc. 2d at 867-68, 498 N.Y.S.2d at

696. And having lost its more traditional claims through inaction (and a desire to extract more rent from IBM), SRA should not now be allowed to contort contract law and create a cause of action by reading the Lease more broadly than its terms reasonably and naturally allow.

III. IN ALL EVENTS, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO SRA BECAUSE THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT AN ENTRY OF JUDGMENT IN ITS FAVOR.

Even if this Court were to conclude that the lower court properly rejected IBM's Motion for Summary Judgment, reversal would still be appropriate because the lower court entered judgment for SRA on an insufficient record.

To prove that IBM violated the good order and condition clause, SRA had to provide undisputed evidence that (i) IBM did not peaceably yield up to SRA "the premises in good order and condition" *and* (ii) that any "damage, destruction or loss by fire or other casualty" to the premises "is not covered by insurance carried or required by this Lease to be carried by the Landlord." (R. at 55) There is no undisputed evidence to support either of these elements of SRA's claim.

With respect to the first, the lower court did not cite, and SRA did not provide, any undisputed evidence that the parties meant "good order and condition" to mean "free of all contamination." In fact, the lower court's opinion does not even attempt to explain what "good order and condition" means and contains *no* analysis of the condition of the property when it was returned in 1994. The parties, moreover, dispute the meaning of "good order and condition." In IBM's view, good order and condition means that the clean-up was completed to the satisfaction of the requisite governmental agencies, a condition that it satisfied. (*See* R. at 414) (Letter by SRA recognizing that 1984 Agreement requires only compliance with law) In addition, the court failed to cite, and SRA failed to submit, any testimony or other evidence from someone with personal knowledge about the condition of the premises on March 1, 1994, the relevant date of

surrender under the Lease. Because the record was bereft of sufficient evidence concerning the condition of the premises in 1994, the court could not conclude that the premises were, indeed, not returned in good order and condition. *See Tagert v. 211 East 70th St. Co.*, 63 N.Y.2d 818, 820-21, 472 N.E.2d 22, 23-24, 482 N.Y.S.2d 246, 247-48 (1984) (self-serving statements by parties insufficient to support summary judgment).

With respect to the second element, the lower court simply ignored the requirement that SRA prove any contamination was uninsured. The Lease expressly excepted from the good order and condition clause "damage, destruction, or loss by fire or other casualty or by any other cause unless such damage, destruction or loss is caused by the willful act or negligence of the Tenant *and* is not covered by insurance carried or required by this Lease to be carried by the Landlord." (R. at 55) (emphasis added) *See Budofsky v. Hartford Ins. Co.*, 147 Misc. 2d 691, 694-96, 556 N.Y.S.2d 438 (Sup. Ct. Suffolk 1990) (holding contamination by tenant was covered under landlord's insurance policy). The lower court could not have concluded that the damage caused by the contamination was uninsured because, to date, SRA has not produced the insurance policy in force at the time of the leak or at the time the contamination was discovered, investigated or abated. *See Radow v. Weiss*, 288 A.D.2d 453, 733 N.Y.S.2d 488 (2d Dep't 2001) (summary judgment inappropriate on incomplete record); *Finklestein v. Cornell Univ. Med. Coll.*, 269 A.D.2d 114, 117, 702 N.Y.S.2d 285, 289 (1st Dep't 2000) (same); *see also Mackey v. Southampton Hosp.*, 264 A.D.2d 410, 410-11, 694 N.Y.S.2d 119, 120-21 (2d Dep't 1999) (where plaintiff has failed to produce any evidence of issue necessary to support grant of summary judgment, judgment should be entered for the defendant).

Any of these evidentiary failures, independently, should have precluded summary judgment in SRA's favor. *See id.* Because IBM was not required to prove the condition of the

land or the insurance requirements to prevail, however, this lack of evidence would not preclude judgment in its favor.

CONCLUSION

For these reasons the decision of the Dutchess County Supreme Court should be reversed and judgment entered for IBM, dismissing all claims against it. Alternatively, the decision should be reversed and this matter remanded for further proceedings on the open evidentiary issues.

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